EDDIE LEE KIM TAK

v.

JK DEVELOPMENT SDN BHD & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ MOHAMAD J
[PETITION NO: D2-26-42-95]
29 MAY 1997

COMPANY LAW: *Winding up - Opposition to petition - Two petitions filed for oppression and for winding up - Whether an abuse of the process of Court - Whether plaintiff to be put to election - Companies Act 1965, ss. 181 & 218*

CIVIL PROCEDURE: *Action - Abuse of process - Two petitions for relief under ss. 181 & 218 of Companies Act 1965 - Stay of petition for oppression or plaintiff to elect which petition to be proceeded with*

The petitioner filed a petition for oppression under s. 181 and a petition for winding up under s. 218 of the Companies Act 1965. In both petitions the petitioner prayed for an order that the company be wound up although in the oppression petition there was an alternative prayer for the purchase of the petitioner's shares by the respondent. In both petitions the parties and facts were identical. The respondent applied for an order that the oppression petition be stayed permanently or that the petitioner be put to election whether to proceed with the oppression petition or the winding up petition.

Held:

[1] The presentation of two petitions is *prima facie* a multiplicity of proceedings amounting to an abuse of the process of the Court. A petitioner may have *bona fide* reasons for presenting two petitions but no such reasons were adduced in this case.

[2] Where a statute provides for two or more courses for obtaining remedies, a person qualified to take either course has the right to take both courses with *bona fide* reasons and for a *bona fide* purpose. Where pursuit of all courses is unnecessary, unreasonable or illogical, there is an abuse of the process of the Court.

[Order accordingly.]

Cases referred to:
Ng Seng Sun & 2 Ors v. Ban Guan Hin Realty Sdn Bhd (unreported) ***(refd)***
The Lyn Country Sdn Bhd v. EIC Clothing Sdn Bhd & Anor [1997] 4 MLJ 199 ***(not foll)***
Re Tivoli Freehold Ltd [1972] VR 446 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 181, 218

For the petitioner - VP Pradhan (Kamraj Nayagam with him); M/s Skrine & Co
For the respondents - RR Sethu (YT Ling with him); M/s RR Sethu

JUDGMENT

Abdul Aziz Mohamad J:

On the very day that the petitioner filed the petition in this case, which is an oppression petition under s. 181 of the Companies Act 1965, he also filed a winding-up petition under s. 218 of that Act in case No. D2-28-412-95. In both the petitions, the parties are the same and the factual grounds relied upon are identical. The first prayer in the oppression petition, as is naturally the principal prayer in the winding-up petition, is for the winding-up of the first respondent company. The second prayer in the oppression prayer is an alternative prayer for the purchase of the petitioner's shares by the respondents.

The respondents, by the present summons in chambers in the oppression petition, apply for an order that the oppression petition be permanently stayed or, alternatively, that the petitioner be put to election as to whether to proceed with the oppression petition or the winding-up petition.

The respondents contend that the concurrent maintenance of the two petitions, being proceedings between the same parties based on identical facts and grounds of complaint, is *prima facie* an abuse of the process of the Court.

In submitting that the application should be dismissed, the petitioner seems to rely on the general proposition that where a statute provides two or more remedies to a person, he is entitled to seek all the remedies and ought not to be required to elect between them, and on two decisions of the High Court.

The first decision is my own unreported decision given on 21 July 1994, in *Ng Seng Sun & 2 Ors. v. Ban Guan Hin Realty Sdn. Bhd.* [Kuala Lumpur Case No. D3-28-39-90]. In that case the petitioners presented on the same day an oppression petition and a winding-up petition. The winding-up petition was served on the respondent company several months after the oppression petition.

The company sought to have the winding-up petition struck out. Two of the grounds for striking out were that the winding-up petition was a wasteful

duplicity and that the petitioners actually did not require a winding-up. I considered the two grounds together.

In my judgment I summarized the essence of the company's submission as follows:

> Intipati hujah pihak responden dalam dua kategori itu ialah bahawa, dengan menyampaikan petisyen penindasan terdahulu daripada petisyen penggulungan, pempetisyen-pempetisyen menunjukkan bahawa apa yang sebenarnya penting bagi mereka ialah deklarasi dan perintah-perintah yang dipohon dalam petisyen penindasan di bawah s. 181 itu. Walaupun, di bawah sub-s. (2)(c) seksyen itu, Mahkamah juga berkuasa memerintahkan penggulungan, tetapi pempetisyen-pempetisyen tidak memohon penggulungan di bawah seksyen itu. Petisyen penggulungan di bawah s. 218 adalah bertujuan untuk menggendala dan menyusahkan Syarikat Realty. Walau bagaimanapun, kalaupun pempetisyen-pempetisyen sebenarnya mahukan penggulungan, Mahkamah masih boleh memerintahkan penggulungan di bawah s. 181 walaupun tidak dipohon khusus dalam petisyen penindasan.

It is to be observed that, according to that summary of mine, the company were not saying that the petitioners absolutely did not have the right to present the two petitions. The company's case was that, in the circumstances of that case, the petitioners could not have genuinely needed a winding-up petition as well and, therefore, that it was presented to disrupt and embarrass the company. Impliedly, to the company, it would have been alright to present two petitions if, in the circumstances, there was a *bona fide* need for doing so.

At pp. 7 and 8A-C of the typed judgment I set out the reasons why the petitioners argued it was necessary that they presented the winding-up petition as well. They had, according to them, a motive for presenting two petitions, which I expressed in the first paragraph at p. 7 as follows:

> Melalui petisyen penindasan itu, mereka bermaksud untuk memulihkan pegangan saham sama banyak dengan keluarga NKL seperti yang wujud sebelum resolusi terbitan hak itu, tetapi sebagai remedi yang lengkap mereka juga mahukan syarikat itu digulung. Jika mereka mendapat pembetulan **(rectification)** pemegangan saham dan penggulungan, mereka akan mendapat bahagian dari penggulungan yang sama banyak dengan keluarga NKL.

In the rest of that part of the judgment I set out the petitioners' reasons for arguing that they would or might not be able to achieve that objective if they did not present the winding-up petition as well.

The petitioners, in response to the tenor of the company's objection, were there trying to justify the presentation of the two petitions. They did not respond

by saying that they had the absolute right to present two petitions. They seemed to recognize that they must have a *bona fide* reason or need for filing the two petitions.

That part of my judgment was followed by my statement of what the stand of the petitioners amounted to. This is what I said at pp. 8 and 9.

> Pendirian pempetisyen-pempetisyen terjumlah kepada ini. Mereka berhak menuntut remedi di bawah s. 181 dan, sebagai tambahan atau alternatif, di bawah s. 218. Sebelum keputusan Mahkamah Agung dalam kes *Lai Kim Loi* itu, tuntutan untuk kedua-dua remedi itu boleh dibuat dalam satu petisyen dan dibicarakan dalam satu perbicaraan. Keputusan Mahkamah Agung itu hanya bererti bahawa dua remedi itu patut dipohon dalam tindakan-tindakan yang berasingan, kerana prosedur-prosedur pra-perbicaraan adalah berbeza antara dua jenis petisyen itu, tetapi tidak mengusik hak kepada dua remedi itu. Walaupun dua remedi itu terpaksa dipohon melalui dua petisyen yang berlainan, akan ada suatu peringkat, setelah selesai segala prosedur pra-perbicaraan, apabila dua petisyen itu akan siap sedia untuk dibicarakan serentak. Oleh kerana Peguam bijaksana bagi responden telah mengakui bahawa, walau apa pun hasil petisyen di bawah s. 181 itu, pintu sentiasa terbuka untuk petisyen di bawah s. 218, adalah wajar (expedient), dari segi menjimatkan masa Mahkamah, sekiranya dua petisyen itu dilupuskan bersama – dan tidaklah petisyen penggulungan terpaksa menunggu petisyen penindasan gagal dahulu sebelum ia boleh difailkan – memandang kepada hakikat bahawa fakta-fakta dan dakwaan-dakwaan yang menjadi asas bagi menuntut dua remedi itu adalah serupa. Demikianlah pendirian pempetisyen-pempetisyen.

What I said in that passage was what I perceived the petitioner's stand amounted to. Nothing in that passage is a statement of my own opinion. The statements about the right to seek remedies both under ss. 181 and 218 are statements of what the petitioners were saying, and they must be understood to be speaking about that right in the context of their response to the respondents' objection as I set out in the earlier part of the judgment at pp. 7 and 8A-C, that is to say, right by virtue of justification, not an absolute right.

My decision, at p. 9E, was simply to find that the petitioners had given satisfactory reasons for presenting the winding-up petition that was sought to be struck out. It was a decision on the issue as to whether the petitioners had good reason for wanting to present a winding-up petition in addition to an oppression petisyen. My decision is not to be construed as my having formed the opinion that the presenting of petitions both under ss. 181 and 218 is an absolute right.

The other case relied on by the petitioner is *The Lyn Country Sdn. Bhd. v. EIC Clothing Sdn. Bhd. & Anor*. [1997] 4 MLJ 199, decided by Kamalanathan Ratnam JC on 15 June 1996.

In that case the petitioner, two days after presenting a winding-up petition, presented an oppression petition. The facts relied on in the two petitions were the same. The respondents applied for striking out of both petitions. Several grounds were put forward and considered in the judgment. The part of the judgment that dealt with the question of concurrency of the two petitions is at p. 45 onwards of the typed Judgment. The only statement of the learned Judge himself on the law or principle relating to the question of concurrent petitions under ss. 181 and 218 is the following at p. 47 of the typed Judgment:

> On the authority of *Lai Kim Loi v. Dato Lai Fook Kim & Anor*. [1989] 2 MLJ 290 I am of the view that the petitioner has every right to present the petitions separately under ss. 181 and 218 of the Act respectively ...

The learned Judicial Commissioner was relying on *Lai Kim Loi* for his view, but, to my understanding, *Lai Kim Loi* did not decide the question whether a person has a right to present petitions under ss. 181 and 218 concurrently. It is necessary to have a close look at that case.

The petitioner presented a petition entitled "Companies Winding-up No. 6 of 1985" alleging oppressive conduct on the part of the first respondent and his son and praying for four specific orders. The purpose of the first two orders was to secure an equal shareholding for him and the first respondent in the company concerned. The fourth order was "that (the company) may be wound up by the Court under ss. 181 or 218 of the Companies Act 1965".

The day after he filed the petition, the petitioner filed a writ against the first respondent in Suit No. S235 of 1985 by which he sought several orders the purpose of which was also to secure an equal shareholding for him and the first respondent in the company.

The petitioner proceeded with the suit and obtained directions, and lists of documents were exchanged, but withheld service of the petition for more than a year after its presentation. The petition was advertised under the Winding-up Rules.

The first respondent applied by notice of motion for striking out or stay of the petition on the contention that it was frivolous, vexatious and an abuse of the process of the Court. His grounds for that contention were stated by the Supreme Court at p. 291 (from I left to E right). They may be classified into two grounds. One was the ground of multiplicity, which related to the fact of

there being the petition alongside the suit. The other ground was a procedural ground, which the Supreme Court put in these terms:

> Finally, the first respondent complained that the petition as presented was bad in law because it was presented under the wrong part of the Companies Act 1965, was not in proper form and was not in compliance with the relevant rules of the High Court.

It must be emphasized that the complaint about multiplicity stemmed from the bringing of the petition in tandem with the suit. An issue about multiplicity stemming from the bringing of an oppression petition under s. 181 in tendem with a winding-up petition under s. 218 could not have arisen in that case because there was only one petition, appearing by its title to be a winding-up petition but praying for, in the fourth prayer, an order for winding-up under s. 181 or s. 218.

The learned Judge found that the petition was frivolous and vexatious and was an abuse of the process of the Court. His reason was stated by the Supreme Court as follows at p. 291 F-G right:

> The learned Judge considered that 'a petition under s. 218 of the Companies Act could not be rolled up with a petition under s. 181 of the Companies Act'. He also considered that the petition in this case had not been properly presented and was defective in form and that a wrong procedure had been adopted in its presentation.

If that was the only reason for the learned Judge's decision, then clearly it was a decision as regards the procedural ground and not a decision on the other ground of the first respondent, namely the multiplicity ground, that is to say, multiplicity by reason of the petitioner having instituted the petition in tandem with the suit. It certainly was not a decision on multiplicity by reason of there being a petition under s. 181 as well as a petition under s. 218. As I said, that question could not have arisen in that case and, therefore, there could not have been a decision on it. The fact that the learned Judge considered that a petition under s. 181 could not be rolled up with a petition under s. 218 – which was a procedural question – could not be taken to mean that a petitioner could present a petition under s. 181 and a petition under s. 218 if they were not rolled up. I say that because if that were to be done, as has been done in this case, a question of multiplicity would arise – which is not a question of procedure but a question of multiplicity of action which could give rise to a substantive question of abuse of process – and I do not think in that case that that question was addressed. The decision of the learned Judge must be taken to go as far only as expressed, that is to say, that one could not, procedurally, pray for a winding-up under s. 181 and under s. 218 in the same petition, and must not be extended to mean that,

therefore, the petitioner would have a right to present separate petitions under each of the two sections.

The Supreme Court, on appeal, found that the learned Judge was right in striking out the petition. It means that the Supreme Court found that the first respondent was right in applying for the petition to be struck out. It is therefore necessary to see what the submission of the learned Counsel of the first respondent comprised that influenced the decision of the Supreme Court.

The submission of learned Counsel for the first respondent in the appeal to the Supreme Court, as recounted by the Supreme Court, begins at p. 293 G left and ends at p. 294 H left. The submission about multiplicity in there being a petition and a suit is to be found in the middle, from p. 293 G right to p. 294 D left. The rest, namely, the beginning and the end of that passage appears to be an examination of procedure in connection with the question of rolling up.

The Supreme Court found in favour of the first respondent that the learned Judge was right in striking out the petition. Their Lordships' reasons are to be found in the last two paragraphs at p. 295 and are as follows:

> After consideration of the relevant provisions of our law, it could not be said that this was a case of mere non-compliance with the rules of the Court which requires only amendment of the pleadings. In this case the petition presented was not in accordance with the provisions of the Companies Act 1965 itself, resulting in a petition which was, we would agree with Counsel for the respondents, imprecise and which appears to us to be a hybrid petition purporting to have been presented under two different sections of the Companies Act 1965.
>
> On the question of multiplicity, Mr. Lim has conceded that the issues raised and the relief sought in Suit No. S235 of 1985 have been largely duplicated in the said petition. Although the issues raised and the relief sought are not totally similar yet we consider that the substantial duplication of issues and relief sought in both actions amounted to multiplicity of actions and in all the circumstances of this case, the petition presented is vexatious and is an abuse of the process of the Court and ought to be struck out as the learned Judge has done and not stayed or the petition be allowed to be amended as suggested by Counsel for the petitioner. We were satisfied that the learned Judge had exercised his discretion correctly in striking out the petition and we therefore dismissed the appeal with costs. The deposit is to be paid to the respondents to the account of taxed costs. But to be fair and to ensure that the doors of justice are still open to him, we would add a further order to that made by the High Court that the petitioner be at liberty to file a proper petition under s. 181 of the Companies Act 1965, after disposal of Suit No. S235 of 1985 if he still requires to seek remedy for acts which he alleged to be oppressive to him.

The second paragraph concerns the multiplicity ground by reason of the existence of the petition alongside the suit, a question which apparently was not decided by the learned Judge and did not form the basis of his decision. The first paragraph concerns the procedural question of rolling-up, which was the basis for the learned Judge's decision.

Nowhere did the Supreme Court decide on the question of multiplicity arising from the existence of a petition under s. 181 and another under s. 218. Just as the question could not have arisen before the learned Judge, so it could not have arisen – and apparently did not arise – before the Supreme Court. The ruling of the Supreme Court that a rolled-up petition was bad – just as I said about the ruling of the learned Judge – must be taken as saying so much only, and that too about procedure, and must not be taken to mean that the Supreme Court – without hearing argument about multiplicity and abuse by reason of it, which it could not have and did not – also ruled that a petitioner had a right, whether absolute or qualified, to present a petition under s. 181 as well as a petition under s. 218.

Having said that, however, I would note that at the end of the second paragraph the Supreme Court did say that if the petitioner, after disposal of Suit No. S235 of 1985 one way or another, still required a remedy for oppressive acts, he was at liberty to file "a proper petition under s. 181". The Supreme Court did not say that the petitioner was also at liberty to file a winding-up petition under s. 218. That could be taken as an indication that, to the Supreme Court, what the petitioner really needed was a remedy for oppression, which he could obtain under s. 181, which empowers the Court to even order a winding-up, and therefore the petitioner did not need to file also a petition for winding-up under s. 218.

It is clear to me that *Lai Kim Loi* is not an authority for the proposition, as stated in *The Lyn Country*, that a petitioner "has every right", which I take to mean an absolute right, to petition both under ss. 181 and 218.

I am of opinion that the presentation by the petitioner of the two petitions is *prima facie* a multiplicity of proceedings amounting to an abuse of the process of the Court. With the presentation of the oppression petition, in which the petitioner prays for winding-up of the company or, alternatively, an order for the purchase of his shares, the winding-up petition is wholly unnecessary. If the petitioner desires only a winding-up, then the oppression petition is wholly unnecessary. The abuse lies in the fact that one or other of the petitions is unnecessary. An unnecessary action is an abuse of the process of the Court. A petitioner may have *bona fide* reasons for needing to present two petitions, as the petitioners in *Ng Seng Sun* successfully claimed before me they had, in which case the two petitions can be allowed to remain. In this case,

however, no reasons have been advanced why the petitioner needed to present two petitions. At p. 6 of the petitioner's written submission it is said that "... here, for the reasons found in *Ng Seng Sun & 2 Ors. v. Ban Guan Hin Realty Sdn. Bhd.* and *Re Tivoli Freehold Ltd.* [1972] VR 446 ... it is abundantly clear that one action will not do". With respect, it is not at all clear to me that one petition will not do. I do not believe that the petitioner here meant to adopt as his justification for presenting the two petitions the justification put forward by or for the petitioners in *Ng Seng Sun*. The justification in a case depends on the particular circumstances of the case and cannot be adopted for another.

The proposition that, where statute provides two or more courses of action for obtaining remedies, a person qualified to take either of the courses has the right to take both courses and cannot be deprived of it is too sweeping a proposition. A right is to be pursued with *bona fide* reasons and for a *bona fid*e purpose. Where pursuit of all the courses is unnecessary, unreasonable or illogical in the given circumstances of a case, there is an abuse of the right available through some one or other of the courses in insisting on following all the courses, and coming to Court to pursue all those rights is an abuse of the process of the Court. Such is the case with the two petitions here.

For those reasons I allow this application with costs for the respondents. As from a written clarification of learned Counsel for the respondents dated 15 March 1997, there appears to be some uncertainty as to the proper orders to be made in the circumstances now prevailing, I shall hear Counsel further before making any order.

Reported by Pushpa Nair